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HAROLD B. WILLEY,

In the

Supreme Court of the United States

OCTOBER TERM, 1953

No. 701

DORA LEE BOWMAN, ADMINISTRATRIX OF THE ESTATE OF FRED E. BOWMAN AND ADMINISTRATRIX DEBONIS NON OF THE ESTATE OF FRANK K. BOWMAN, *Petitioner*

vs.

JOANNE W. BOWMAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

JAMES L. MOORE
WILL G. MOORE
Counsel for Petitioner.

WILLIAMS PTG CO-ATLANTA

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In the

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OCTOBER TERM, 1953.

BOWMAN, ET AL.,
vs.
BOWMAN.

No.....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Dora Lee Bowman, Administratrix of the Estate of Fred E. Bowman and as the Administratrix Debonis non of the Estate of Frank K. Bowman, Petitioner.

Your petitioner respectfully shows:

That this is a petition for a writ of certiorari to the Supreme Court of the State of Georgia, to review a decision of the Supreme Court of the State of Georgia, dated November 10, 1953, (adhered to on rehearing November 25th, 1953), affirming a final judgment of the Superior Court of Fulton County, Georgia, which denied motion for new trial, with opinion (R. 139) in an equitable action brought by the plaintiffs against your petitioner. Justice Hugo L. Black extended the time for filing petition for writ of certiorari to and including April 21st, 1954.

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner is the defendant in an equitable petition filed in the Superior Court of Fulton County, Georgia, on January 9, 1950, (R. 6) to which an amendment in two counts was filed by Joanne Bowman to cancel a quit claim deed executed by Frank K. Bowman, her deceased husband, in favor of defendant Fred E. Bowman, dated May 4th, 1949, conveying described realty.

She alleged that she is the widow and sole heir of Frank K. Bowman, deceased, who died on the 28th day of May, 1948.

She alleged further that on the 19th day of December, 1949, that Fred E. Bowman filed for probate both in common and solemn forms an alleged will of Frank K. Bowman, dated 27th day of January, 1946, in which will she was bequeathed certain household furnishings and the rest of his estate devised and bequeathed to Fred E. Bowman, who was named therein as Executor. That the will was probated in common form, and that defendant had qualified thereunder as Executor, and that she would file at the proper time a caveat to probation of the will in solemn form.

She alleged that on June 10th, 1949, she filed in the Court of Ordinary of Fulton County an application for twelve months support from the estate of her deceased husband, Frank K. Bowman, and that appraisers were appointed who made a return setting apart to her the certain house and lot, furniture and rents; that defendant Bowman filed a caveat to her application and that the application was disallowed and the year's support refused. That she appealed to the Superior Court from the order refusing her a year's support, and upon trial in the Superior Court the order of the Court of Ordinary was reversed and the year's support allowed.

That defendant Bowman appealed this decision to the Court of Appeals who affirmed the judgment of the Superior Court, and the judgment of the Superior Court as affirmed by the Court of Appeals was made the judgment of the Court of Ordinary, and the judgment was recorded in the Ordinary's office.

She alleged that on the 18th day of June, 1948, defendant Bowman filed for record a Quit Claim Deed purporting to have been executed by Frank K. Bowman in favor of defendant Fred E. Bowman, dated May 4th, 1948, conveying described realty, attaching copy of said deed as an Exhibit. That the signature on the said deed is not the signature of Frank K. Bowman, the deed is a forgery, that the execution of the said deed was not the act of Frank K. Bowman, but was the act of someone unknown to her. That the deed is null and void and a cloud upon her title and should be delivered up and cancelled of record. That the said realty was in possession and control of the defendant Fred E. Bowman on May 28th, 1949. That defendant Bowman is insolvent and would be unable to respond to damages to any judgment your petitioner may recover against him. The amendment adding Count Two and Three contained substantially the same allegations as set out in the petition, except that in Count Two, paragraph 45—R. 26 she alleged that the decedent, Frank K. Bowman, at the time of the alleged execution of the deed, he did not have sufficient mental ability to be aware of the nature of his act in executing the said deed, if he did execute it, and did not have sufficient mental ability to make a valid deed; in paragraph 46 she alleged for this reason the said deed is null and void and should be delivered up and cancelled of record. In Count Three, paragraphs 66 and 67 and 68—R. 39 she alleged that on or about March 1st, 1946, decedent appeared at her door in Pensacola, and that he was unable to talk and could not explain to her how he made the

trip, but he remained with her until on or about August 27, 1946. That the decedent showed steady improvement in his physical and mental condition, regaining in some small degree his ability to walk and talk, although he was unable at all times to utter more than a few words. The plaintiff's prayer was that the court declare the said quit claim deed from Frank K. Bowman to Fred E. Bowman null and void and order same to be delivered up and cancelled of record, and that a temporary and permanent receiver be appointed, and that the defendant be restrained and enjoined from interfering with the Receiver.

Defendant filed a general demurrer to the petition as amended, and also filed an answer to the petition in which he denied each and every material averment made in the petition as amended.

The trial court overruled defendant's demurrer. The Supreme Court of Georgia affirmed this judgment with opinion reported in 207 Ga. 226, 60 S.E. 2nd 242 holding that the petition set forth a cause of action for the appointment of a Receiver to preserve the property pending a final adjudication on the probate of the will dated February 27, 1946.

Upon trial the jury returned a verdict in favor of the plaintiff, and judgment rendered thereon in her favor—R. 48. Defendant filed his motion for new trial. This motion as amended was overruled by the trial court—R. 51. The Supreme Court of Georgia affirmed, with opinion—R. 139, although defendant insisted that the petition did not set forth a cause of action for the cancellation of the deed, that the plaintiff was not the proper person to maintain the suit, that she did not have title to the property, and that the judgment was void—R. 145. A rehearing was denied generally without opinion—R. 161, and the motion for reconsideration was not allowed to be filed. ~~The motion is attached as Exhibit "A".~~

It concluded that the plaintiff was suing as a party to whom

the particular property had been set apart as a year's support; that is, that she was not proceeding as an heir at law, but that she was suing as a successor in title to the property to Frank K. Bowman—R. 6.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The questions involved are of general public interest. They arise in an equitable action by the widow and sole heir at law of her deceased husband to cancel a quit claim deed executed by him as a cloud upon her title brought under Georgia Code Sections which provide that upon the death of an owner of any estate in realty, which estate survives him, that the title shall vest immediately in his heirs at law, subject to be administered by the legal representative; if there is a legal representative, the right to recover such realty shall be in him; if there is none, the heirs may sue in their own names. Also, upon the appointment of an administrator the right to possession of the whole estate is in him, and as long as said administrator continues the right to recover possession of the estate from third persons is soley in him. If there is no administrator, or if the administrator appointed consents thereto, the heirs at law may take possession of the lands or may sue in their own name.

1.

The allegations of the plaintiff's petition indicate that she is suing as the widow and sole heir at law of her deceased husband—R. 6.

2.

The Supreme Court of Georgia held: "That as the case now comes to us the parties seeking to cancel the deed is the person to whom the particular property has been set apart as a year's support. She is not now seeking to recover as a

sole heir at law." By its decision it nullified the Sections of the Code of Georgia which provide that only heirs at law may sue in their own name to recover realty from third persons, if there is no administrator appointed, or if there is an administrator appointed, and he consents thereto, they may sue in their own name—R. 139. It held in effect that the plaintiff could maintain this suit as a successor in title to the realty of the decedent. This holding is repugnant to these Code Sections.

Code Sections of 1933 Code of Georgia, 113-901, and 113-907.

The intention to depart from the established rule was deliberate. The Supreme Court of Georgia relied on the allegations that the particular property had been set apart to the plaintiff as a year's support. It chose to change the cause of action with knowledge that such ruling was repugnant to provisions of the Code Sections under which it was brought, and in direct conflict with its decisions in every case in which were involved the identical or similar issues as herein involved.

Crawley vs. Selby, et al, 208 Ga., 530, 67 S. E., 2nd 775.

3.

The Supreme Court of Georgia held that the issues of matter of the final adjudication of the will of Frank K. Bowman, dated February 27, 1946, and the issue that Frank K. Bowman died intestate are immaterial—R. 139. This holding is in direct conflict with its former decision in this case, reported in ***Bowman vs. Bowman,*** 207 Ga., 226, 60 S. E., 2nd, 242.

4.

The Supreme Court of Georgia, by affirming the judgment of the trial court, in effect held that the plaintiff's petition

set forth a cause of action for the cancellation of the quit claim deed. This holding is repugnant to the Code Sections under which the action is brought. It is in direct conflict with its former decision in this case, and in direct conflict with its decision in every case in which the identical or similar issues were involved. Such discrimination against the defendant deprived him of property without due process of law and the equal protection of the law, contrary to the provisions of the 5th and 14th Amendment of the Constitution of the United States.

5.

The judgment under review, R. 144, is in direct conflict with its decision in the case of *Bowman, et al, vs. Bowman,* 206 Ga., 262, 56 S. E., 2nd, 407, and direct conflict with its decisions in every case which involved the same or similar issues.

QUESTIONS NOT IN CONFLICT.

6.

The Supreme Court of Georgia held that it was not error to admit the order by the Ordinary setting aside a former order denying the award of a year's support, and substituting therefor an order allowing the award of a year's support over the objection of defendant upon the ground that the order denying the year's support was appealed to the Superior Court and the appeal had not been tried and was still on appeal in the Superior Court. This holding in effect held as a matter of law that the order denying the award as a year's support and appealed to Superior Court had been tried in that court and reversed by the Superior Court, and the judgment of the Superior Court was appealed to the Court of Appeals, and affirmed by that court, and the affirmance of that court of the Superior Court's judgment reversing the Court of Ordinary and allowing the award was then made

the judgment of the Court of Ordinary. This holding is erroneous.

7.

The Supreme Court of Georgia held that it was not error to deny the admission of the documentary evidence offered by the defendant, being the appeal from the order denying the award of a year's support upon the ground that the appeal had never been tried, and is still pending—R. 139. This holding is erroneous.

An authoritative decision from this Court, settling the conflict, is necessary.

The decision under review destroys the defense of petitioner as provided for by the Code Sections under which it is brought, and does not give him the same protection as given to other persons in other cases where the same or similar issues are involved and deprives him of property without due process of law and the equal protection of the law, as provided for in the 5th and 14th Amendment of the Constitution of the United States.

The record is voluminous and the printing thereof would be very expensive. Petitioner's finances are meager. Counsel for plaintiff and defendant in certiorari agree the printing of the record should be dispensed with, therefore petitioner moves that the printing of the record be dispensed with.

III.

FEDERAL QUESTIONS ON WHICH ERROR IS ASSIGNED.

1.

The Code Sections under which the plaintiff is proceeding in this case were not considered by the Supreme Court of Georgia. The decision is repugnant to these provisions, and deprives the defendant, Fred E. Bowman, of property with-

out due process of law and the equal protection of the law, to which he is entitled to under the 5th and 14th Amendments of the Constitution of the United States.

2.

The judgment denying the defendant's motion for a new trial and the opinion of the Supreme Court of Georgia denying all relief to the defendant, who was sued for the cancellation of a quit claim deed by the sole heir at law, who admits there was an administrator appointed, under the Sections of the Georgia Code which provides that the sole right to bring such an action is in the administrator, if there is an administrator appointed, is a violation of the rights guaranteed to him under the 5th and 14th Amendment of the Constitution of the United States.

3.

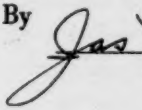
The direct conflict of this decision with all of its decisions in every case decided by it in which the identical or similar issues were involved, deprives him of property without due process of law and the equal protection of the law as provided in the 5th and 14th Amendment of the Constitution of the United States.

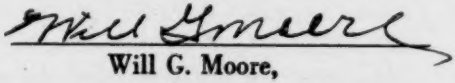
W-H-E-R-E-F-O-R-E, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Georgia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Georgia had in the case numbered and entitled on its docket, No. 18391, *Bowman, et al., vs. Bowman,* defendant in error, to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the order and judgment of said Supreme

Court of Georgia be reversed by this Court, and for such other and further relief as to this Court may seem proper; and your petitioner will ever pray.

Dated Atlanta, Georgia, April 10th, 1954.

Dora Lee Bowman,
Administratrix of estate of Fred E. Bowman, and Administratrix debonis non of Frank K. Bowman.

By 
James L. Moore,


Will G. Moore,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Georgia is reported in 78 S. E. Reporter, 2nd, page 801, and is appended to the record (R. 139).

II.

JURISDICTION.

1. The date of the order and judgment of the Supreme Court of Georgia, affirming the judgment overruling the motion and denying the grant of a new trial by the trial court on November 10th, 1953 (R. 144), the date of the judgment denying a rehearing on November 25, 1953 (R. 135). Justice Hugo L. Black extended the time for filing petition for writ of certiorari to and including April 21st, 1954.

2. The statutory provisions which is believed to sustain the jurisdiction of this court is section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43, statute 936.

3. The Supreme Court of Georgia in its decision and its adherence thereto denying the motion for a rehearing passed on the Constitutional question as herein stated and denied them (R. 161). These decisions were a surprise to the petitioner for certiorari.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under "Summary Statement of Matter Involved" I (pp. 2 to 5).

IV.

AUTHORITIES AND ARGUMENT.

A. Reasons relied on for allowance of the writ:

1. "Upon the death of the owner of any estate in realty which estate survives him, only the legal representative or administrator has the right to recover such realty except where there is no legal representative or administrator appointed or if the administrator appointed consents thereto the heirs may sue in their own names. The title to other property owned by a decedent shall vest in the administrator of his estate for the benefit of the heirs and creditors."

Georgia Code, 1933, Section 113-901.

"Upon the appointment of an administrator, the right to the possession of the whole estate is in him, and, as long as such administrator continues, the right to recover possession of the estate from third persons is solely in him. If there is no administration, or if the administrator appointed consents thereto, the heirs at law may take possession of the lands or may sue therefor in their own right."

Georgia Code, 1933, Section 113-907.

"It is the general rule in Georgia that, before heirs at law of an intestate can recover land, they must allege and prove that there is no administration upon his estate; or, if there is an administrator, that he has consented to their bringing the suit."

Greenfield v. McIntyre, 112 Ga., 691, 38 S. E. 44.
Crummey v. Bentley, 114 Ga., 746, 40 S. E. 765.
Strickland v. Fender, 142 Ga., 132, 82 S. E. 561.
Yerbey v. Chandler, 194 Ga., 263, 21 S. E. 2d, 636.
Clark v. Woody, 197 Ga., 683, 30 S. E. 2d, 181.
Bowman v. Bowman, 206 Ga., 262, 56 S. E. 2d. 497.
Crawley v. Selby, et al, 208 Ga., 530, 67 S. E. 2d, 775.

The wife as sole heir at law cannot mantain an action to cancel a deed executed by her deceased husband unless he died intestate.

Murray vs. McGuire, 129 Ga., 269, 58 S. E., 841.
Turner vs. Holbrook, 145 Ga., 603, 89 S. E., 700.
Elliott vs. Johnson, 178 Ga., 384, 173 S. E., 399.
Benton vs. Turk, 188 Ga., 710, 4 S. E., 2nd, 580.
Bowman vs. Bowman, 206 Ga., 262, supra.

The plaintiff's petition as amended did not set forth a cause of action for the cancellation of the deed.

Bowman vs. Bowman, 207 Ga., 226, 60 S. E. 2nd, 242, and the cases cited above.

Plaintiff's petition shows on its face that the title to the property was not vested in the decedent at the time of his death, and if it ever was ever vested in him it was conveyed out of him by the quit claim deed (R. 6).

Code of Georgia, 1933, Section 81-304, provides:

"A demurrer denies the right to the relief sought, whole or in part, admitting all properly pleaded allegations in the petition to be true."

A year's support can be set aside only out of the estate of the deceased.

Burkhalter vs. Planters Loan and Savings Bank, 100 Ga., 428, 28 S. E., 236.
Zeagler vs. Zeagler, 190 Ga., 220, 9 S. E. 2d, 263.
Harris vs. Mandeville, 195 Ga., 251, (6)24, S. E. 2d, 23.
Scruggs vs. Morel, 22 Ga. App., 95 S. E., 316.

B. A judgment of the Court of Ordinary allowing a year's support for the family of a deceased person will not attach to property which has been conveyed by the deceased prior to his death and no longer a part of his estate.

Odom, et al, vs. Hoppendeitzel, 153 Ga., 20, 111 S. E., 419.

Bank of Wrightsville vs. Powell, 163 Ga., 291, 135 S. E., 922.

Exchange Bank vs. Cash, 169 Ga., 753, 151 S. E., 345.

Backer vs. City Banking & Trust Co., 180 Ga., 672, 182 S. E. 604.

Richey vs. First Natl. Bank of Commerce, 180 Ga., 751, 180 S. E., 740.

Matthews vs. Manhattan Life Ins. Co., 55 Ga. Apps. 204, 189 S. E., 858.

Johnson vs. City of Blackshear, 196 Ga., 652, 27 S. E. 2d, 316.

A judgment setting apart a year's support does not adjudicate that the property set apart existed and was the property of the deceased.

Zeagler vs. Zeagler, 190 Ga., 220, 225, supra.

Wood vs. Brown, 121 Ga., 471, 49 S. E., 295.

Smith vs. Smith, 101 Ga., 296, 28 S. E., 665.

Dougherty-Little-Redwine Co. vs. Hatcher, 169 Ga., 858, supra.

A conveyance by husband defeats right of year's support out of property conveyed.

Henry Summerford, Admr., vs. James Gilbert, 37 Ga., 59.

Odom vs. Hoppendeitzel, 153 Ga., 20, supra.

Bank of Wrightsville vs. Powell, 163 Ga., 201, supra.

Exchange Bank vs. Cash, 169 Ga., 753, supra.

Booker vs. City Bank and Trust Co., 180 Ga., 672, 180 S. E., 604.

Richey vs. First Natl. Bank of Commerce, 180 Ga., 751, supra.

Matthews vs. Manhattan Life Ins. Co., 55 Ga. App., 204, supra.

Plowden vs. Plowden, 47 Ga. App., 751, 171 S. E., 388.

Griffith vs. Haygood, 174 Ga., 22, 161 S. E., 830.

Scruggs vs. Morel, 22 Ga. App., supra.

A judgment of Ordinary allowing a year's support for family will not attach to property which has been conveyed by decedent prior to his death.

Richey vs. First Natl. Bank of Commerce, 180 Ga., 751, supra.

Haddock vs. Callahan Grocery Co., 163 Ga., 204, 135 S. E., 747.

The plaintiff cannot maintain this action to cancel the deed for the reason she fails to show any title to the described property.

Spence vs. Brown, 198 Ga., 566, 32 S. E., 2d, 302.

A true owner alone can maintain an action to remove cloud from title.

Weyman vs. City of Atlanta, 122 Ga., 539, 50 S. E., 492.

McMillen vs. Cooper, et al., 125 Ga., 435, 54 S. E., 97.

The general rule is that only the personal representative of deceased person or his heirs at law can bring suit in order to avoid a contract made by him while mentally incompetent who has never been adjudicated to be insane.

1933 Code of Georgia, Section 20-206.

McClure Realty Co. vs. Eubanks, 151 Ga., 765, 108 S. E., 204.

The Supreme Court of Georgia, in its former decision, reported 207 Ga., 226, supra, and its holding in *Bowman vs.*

Bowman, 206 Ga., 262, supra, is the law of the case and is binding upon the trial court and upon the Supreme Court of Georgia.

Rivers vs. Brown, 200 Ga., 49, 36 S. E., 2d, 429, citing 21 C. J. S., page 314, Section 190-3.

The Supreme Court of Georgia and the trial court are bound by decision of the Supreme Court of Georgia in its ruling on the demurrer in this case.

The plaintiff's claim of an award for a year's support was not justified.

Plaintiff's petition shows that Frank K. Bowman died testate, naming an Executor who qualified, and that he conveyed the described property to a third party prior to his death.

The plaintiff cannot maintain this action as a successor in title to Frank K. Bowman.

1933 Georgia Code, Section 113-901, 113-907, supra, and cases cited.

A failure to demur does not confess the action either in law or in fact. A defendant who passes over, without demurring, a petition which is fatally defective in that it does not set forth a cause of action, may still attack the same on this ground by an oral motion to dismiss the case at any time before the verdict; after verdict by motion in arrest of judgment made during the term at which the judgment was rendered or by assigning error on the judgment by a writ of error sued out in due time or within three years from the date of judgment by motion to set aside.

Kelly vs. Strouse, 116 Ga., 87, 43 S. E., 280.
Crew vs. Hutchenson, 115 Ga., 511, 42 S. E., 16.
Goff vs. Natl. Bank of Tifton, 170 Ga., 691, 155 S. E., 767.

Sou. Railway Co. vs. Stephens, 23 Ga. Apps., 200, 98 S. E., 176.

The judgment of the Ordinary refusing the allowance of a year's support which was appealed to the Superior Court was not tried. The judgment affirmed by the Court of Appeals of Georgia was a judgment on a demurrer to the reinstatement of a caveat. The decision, 79 Ga., Apps., 240, 53 S. E., 2nd, 244, shows this.

Justice Hugo L. Black extended the time for filing petition for writ of certiorari to and including April 21st, 1954.

Petitioner did not comprehend that the Supreme Court of Georgia discriminated against her. But assumed that the Supreme Court of Georgia had fairly overlooked certain facts, issues and law, as alleged in her motion for a rehearing. (R. 145.)

The writ should be granted and the decision of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

Jas L. Moore

Jas. L. Moore,

Will G Moore

Will G. Moore,

Counsel for Petitioner

432 Peachtree Arcade Bldg.,
Atlanta, Ga.

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IN THE

Supreme Court of the United States

No. 701

DORA LEE BOWMAN, Administratrix of the Estate of Fred E. Bowman and Administratrix de Bonis Non of the Estate of Frank K. Bowman

Petitioner

vs.

JOANNE W. BOWMAN

Respondent

Brief in Response to Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

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STATEMENT OF FACTS

The action upon which the instant petition for writ of certiorari is based was a bill in equity brought by Joanne W. Bowman, respondent herein, against Fred E. Bowman, deceased, in the superior court of Fulton County, Georgia, for cancellation of a quit claim deed alleged to have been executed by Frank K. Bowman in favor of Fred E. Bowman on May 4, 1948, just prior to the death of Frank K. Bowman which occurred on May

28, 1948, which deed was filed for record in the office of the clerk of the superior court of Fulton County, Georgia, on June 8, 1948, after the death of said Frank K. Bowman. The petition also sought other remedies incident to the main action by way of receivership, accounting, and so forth, none of which was insisted upon.

Respondent is the widow of Frank K. Bowman, the alleged grantor in said deed.

The action as amended was brought in three counts, the first count being based on forgery, the second on mental incapacity of the grantor to execute a deed and the third on undue influence.

Each count of the action alleged that respondent had been awarded the equity of Frank K. Bowman, her deceased husband, as a year's support, which is a statutory award under the laws of Georgia designed to provide for the widow and minor children, where such exist, for a year after the death of the husband and father.

Each count set forth allegations upon which cancellation of the said deed was therein sought. (R. Pleadings)

To the said action petitioner in certiorari filed an answer and general and special demurrers. The general demurrer was heard and resulted in a judgment overruling the same, to which judgment petitioner in certiorari excepted. Her bill of exceptions was taken to the Supreme Court of Georgia where the judgment of the lower court was affirmed (*Bowman* vs. *Bowman,* 207 Ga. 226, 60 SE 2d 455). Her special demurrers were afterwards heard and overruled.

Petitioner in certiorari also filed separately a motion to dismiss and a plea of res judicata, which motion and

plea were overruled. Petitioner in certiorari took this decision also to the Supreme Court of Georgia, where the judgment of the lower court was affirmed (*Bowman* vs. *Bowman*, 209 Ga. 200, 71 SE 2d 84).

Before trial of the action here involved, Fred E. Bowman died and his widow, Dora Lee Bowman, as administratrix of the estate of Fred E. Bowman, and as administratrix de bonis non of the estate of Frank K. Bowman, was substituted as defendant in his stead.

Upon trial of the action here involved, upon its merits, before the Honorable Claude E. Shaw, a judge of the superior court of Fulton County, Georgia, and a jury, commencing on March 2nd, 1953, a verdict was rendered for respondent, whereupon the court entered a judgment and decree in her favor. (R. Decree)

Petitioner in certiorari thereupon filed a motion for new trial, which was overruled, whereupon the case was taken by bill of exceptions to the Supreme Court of Georgia, which court affirmed the lower court and later denied the motion for rehearing of petitioner in certiorari, and refused to consider her petition for reconsideration.

As stated by Justice Wyatt of the Supreme Court of Georgia, in his opinion in this case, this matter has had a long and involved history in the appellate courts of this state. The decision here sought to be reviewed marks the sixth appearance in the appellate courts of Georgia of various phases of this litigation over the property here involved, all of them being preparatory to or looking toward cancellation of the deed here involved: *Bowman* vs. *Bowman*, 205 Ga. 798, 55 SE 2d 298 (dealing with a will of November 1, 1946), *Bowman* vs. *Bowman*,

79 Ga. App. 240, 53 SE 2d 244 (dealing with the year's support action), *Bowman* vs. *Bowman,* 206 Ga. 262, 56 SE 2d 497 (dealing with the first deed case, which failed), *Bowman* vs. *Bowman,* 207 Ga. 226, 60 SE 2d 242, (dealing with the general demurrer to the instant case), *Bowman* vs. *Bowman,* 209 Ga. 200, 71 SE 2d 84 (dealing with the plea of res judicata in the instant case), and *Bowman* vs. *Bowman,* .....Ga....., 78 SE 2d 801 (the instant case here complained of).

ARGUMENT OF LAW
AND
CITATION OF AUTHORITIES

It is the contention of petitioner in certiorari that under Code Sections 113-901 and 113-907 of the 1933 Code of Georgia, an heir at law may sue in his own name to recover realty from third persons, only where there has been no administrator appointed, or if there has been an administrator appointed, he consents thereto, and that since your respondent failed to prove that her deceased husband had died intestate; that there had been no administrator appointed, or that an administrator, if appointed, had failed to consent to her action, the judgment of the Supreme Court of Georgia in affirming the judgment of the trial court decreeing a cancellation of the quit claim deed here involved constituted a discrimination against petitioner in certiorari in that it deprived petitioner of property without due process of the law and the equal protection of the law, contrary to the provisions of the 5th and 14th Amendments of the Constitution of the United States.

This reasoning of petitioner in certiorari is fallacious,

first of all, because, as was pointed out by the Supreme Court of Georgia, respondent was not proceeding in the said action as an heir at law of her deceased husband, but as the beneficiary of a statutory award of a year's support in such interest as her deceased husband owned in the said property, under the terms of Section 113-1002 of the 1933 Code of Georgia, which section is as follows:

> "Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family, to be ascertained as follows: Upon the death of any person testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children, or minor child or children only, it shall be the duty of the ordinary, on the application of the widow, or the guardian of the child or children, or any other person in their behalf, on notice to the representative of the estate (if there is one, and if none, without notice), to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of 12 months from the date of administration, in case there is administration on the estate, to be estimated according to the circumstances and standing of the family previous to the death of the testator or intestate, and keeping in view also the solvency of the estate. If there is a widow, the appraisers shall also set apart, for the use of herself and children, a sufficient amount of the household furniture. The amount set apart for the family shall in no event be less than the sum of $100; and if it shall appear upon a just appraisement of the estate that it does not exceed in value the sum of $500, it shall be the duty of the appraisers to set apart the whole of said estate

> for the support and maintenance of such widow and child or children, or, if no surviving widow, to the lawful guardian of the child or children, for their benefit: Provided, that all taxes and liens for taxes accrued against property, an equity of redemption in which is embraced in a year's support duly set apart, shall be thereby divested, the same as if the entire title were included in such year's support."

The award was made in the present case in the Court of Ordinary of Fulton County, Georgia. As will be seen from the reported decision in the case of *Bowman* vs. *Bowman*, 79 Ga. App. 240, 53 SE 2d 244, Fred E. Bowman filed a caveat, or objections, to the year's support award. Later, he withdrew such objections and then sought to reinstate them. Respondent filed a general demurrer to his motion to reinstate on the ground that such caveat came too late. The judge of the Court of Ordinary overruled respondent's demurrer and disallowed a year's support. Respondent appealed these orders to the superior court of Fulton County, Georgia. Under the provisions of Code Section 6-501 of the 1933 Code of Georgia, an appeal from a Court of Ordinary to a Superior Court in the State of Georgia is a de novo investigation and brings up the whole record from the court below. This code section is as follows:

> "An appeal to the superior court is a de novo investigation. It brings up the whole record from the court below, and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not; either party is entitled to be heard on the whole merits of the case."

In an appeal from the judgment of the Court of Ordinary, the Superior Court may hear and sustain a general demurrer previously overruled in the lower court, there-

by terminating the case. *Paxton* vs. *Berrien County, et al.,* 117 Ga. 891.

Upon a hearing in the superior court of Fulton County, the general demurrer of respondent to the motion for reinstatement of the caveat of Fred E. Bowman, petitioner's intestate, was sustained and the caveat dismissed.

Upon appeal of this decision to the Court of Appeals of the State of Georgia, the superior court was affirmed and an order entered directing the judge of the Court of Ordinary to admit to record the return of the appraisers awarding your respondent a year's support in the interest of her deceased husband in the property here involved.

Upon the trial, respondent made no issue of any rights she may have claimed as an heir at law of her deceased husband, but pressed her claim to the property under the year's support award as above set out, which award was properly set forth in each count of her bill and was properly proved.

Petitioner complains that there is a conflict between the decision here sought to be reviewed and a prior decision of the same court, and that this constitutes a discrimination against petitioner in certiorari so as to deprive her of property without due process of law and the equal protection of the law, contrary to the provisions of the 5th and 14th amendments to the Constitution of the United States.

In response to this complaint, respondent would like to point out, first of all, that no constitutional question was raised in the court below and that this court has

many times held that it will not review a case where questions of constitutionality are sought to be raised for the first time in this court.

Spies vs. *Illinois,* 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed. 80

Bolin vs. *Nebraska,* 20 S. Ct. 287, 176 U. S. 83, 44 L. Ed. 382

As to petitioner's contention of discrimination under the 5th amendment to the Constitution, even assuming that such claim had been made in the court below, so as to be reviewable by this court, it would not hold water for the reason that the first ten amendments to the Constitution have been construed to refer exclusively to powers exercised by the United States government and not those exercised by the States.

King vs. *State,* 173 Ga. 432, 163 SE 168, 171

Eilenbecker vs. *District Court of Plymouth County, Iowa,* 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801

Spies vs. *Illinois,* 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed. 80

As to petitioner's contention of discrimination under the 14th amendment, the record itself will refute this. The record reveals the varied course of this case from trial court to appellate courts, and back to trial court, not once, but many times.

"Due Process of Law", as contemplated by the 14th amendment, has been construed to mean the administration of general laws of a state according to established rules, not violative of the fundamental principles of private rights, by a competent tribunal having jurisdiction of the subject matter and proceeding upon notice and hearing.

King vs. *State*, 173 Ga. 432, 163 SE 168, 171

Caldwell vs. *Texas*, Texas 1891, 11 S. Ct. 224, 137 U. S. 697, 34 L. Ed. 816

Duncan vs. *Missouri*, Mo. 1894, 14 S. Ct. 570, 152, U. S. 382, 38 L. Ed. 485

Anderson Natl. Bank vs. *Luckett*, Ky. 1944, 64 S. Ct. 599, 321 U. S. 233, 88 L. Ed. 692, 151 ALR 824

Under this construction, petitioner has beyond doubt been accorded every opportunity, and has manifestly taken advantage of such opportunity, to avail herself of the rights and remedies open to her in the proper tribunals of Georgia. Such complaint is, on its face, ridiculous and beyond the belief of this court.

Wherefore, respond prays:

(a) That the said petition for writ of certiorari be denied;

(b) That this court refuse to review the said judgment of the State court.

Respectfully submitted

Margaret Hills Fairleigh

Attorney for Respondent

POOLE, PEARCE & HALL
1202 Candler Building
Atlanta, Georgia.